In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 645

WILLIAM DUDLEY PELLEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 646

LAWRENCE A. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 647

FELLOWSHIP PRESS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 646–664) has not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered December 17, 1942 (R. 665–666). The petition for writ of certiorari was filed January 12, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court erred in overruling petitioners' plea in abatement on the grounds (a) that women were illegally excluded from the grand jury; and (b) that special assistants to the Attorney General conducted the grand jury proceedings pursuant to the Act of June 30, 1906, which is alleged to be unconstitutional as empowering officers of an Executive Department to perform a judicial function.

2. Whether the indictment sufficiently alleges offenses prohibited by the Sedition Act.

3. Whether the trial court erred in admitting in evidence (a) writings and publications issued by petitioner Pelley prior to the commencement of the war; (b) analyses by experts tending to show a relationship between German short-wave broadcast propaganda and statements made by petitioners after the outbreak of war; and (c) expert analyses of newspaper editorials for the

purpose of showing the falsity of certain of petitioners' statements relating to the state of public opinion.

STATUTES INVOLVED

The full text of Sections 3 and 4 of the Sedition Act of June 15, 1917, c. 30, Title I, 40 Stat. 217, 219, c. 136, 41 Stat. 1359, 1360 (50 U. S. C. 33, 34), and of the Act of June 30, 1906, c. 3935, 34 Stat. 816 (5 U. S. C. 310), authorizing the Attorney General or attorneys appointed by him to conduct grand jury proceedings, are set forth in the Appendix, *infra*, pp. 24–25.

STATEMENT

Petitioners Pelley and Fellowship Press, Inc., were convicted under counts 1 to 5 and 7 to 12, inclusive, and petitioner Brown under count 12 (R. 573), of a twelve-count indictment (R. 2–65).[1] Counts 1 to 5 and 7 to 11 charged violation of Section 3 of the Sedition Act. The twelfth, or conspiracy count charged a violation of Section 4, in that petitioners committed and conspired to commit the acts prohibited by Section 3 (R. 2–8, 9–64). Petitioners Pelley and Brown were sentenced to imprisonment for fifteen years and five years, respectively (R. 601). Petitioner Fellowship Press, Inc., was fined in the amount of

[1] Petitioner Brown, and defendant Agnes Marian Henderson, who was also convicted under count 12 but did not appeal, were found not guilty as to counts 1 to 5 and 7 to 11, inclusive (R. 573). Count 6 was dismissed on motion of the Government (R. 547–550, 572).

$5,000.00 (R. 602). The court below affirmed the convictions (R. 665–666).

The indictment may be summarized as follows:[2]

Counts 1 to 5 and 7 to 9 (R. 2–8, 9–12) alleged, in substance, that, on or about certain specified days between December 22, 1941, and March 2, 1942, while the United States was at war with Japan, Germany, and Italy, petitioners Pelley and Fellowship Press, Inc., willfully made and conveyed false reports and statements printed in their publications, the *Galilean* magazine and a pamphlet entitled "We Fight for This Republic Only!", with intent to interfere with the operation and success of the military and naval forces of the United States and to promote the success of its enemies. Specific false statements were alleged in each count.[3]

Count 10 (R. 12–58) alleged in substance that continuously from December 8, 1941, to the date of the indictment, petitioners Pelley and Fellowship Press, Inc. willfully and intentionally caused and attempted to cause insubordination in the armed forces of the United States, and count 11

[2] Since no error is assigned in respect of the sufficiency of the evidence, it is not summarized here.

[3] In respect of the alleged false statements concerning the extent of the damage to the fleet at Pearl Harbor, and those that the United States had only "On Order" armaments, the Government, to avoid disclosure of valuable information to the enemy, moved to dismiss count 6; and in dismissing that count, the court instructed the jury to disregard the allegations of those matters in the other counts (R. 547–552).

(R. 58–59) charged that they willfully and intentionally obstructed the recruiting and enlistment service of the United States to the injury of the service and of the United States, by means of statements and articles in the *Galilean* magazine and in the pamphlet "We Fight for This Republic Only!", which were set forth in count 10 (R. 12–58)[4] and incorporated by reference in count 11 (R. 59).

Count 12 (R. 59–64) alleged a conspiracy to commit each of the substantive offenses described in the preceding counts and that in order to effect the object of the conspiracy, petitioners did certain acts consisting of printing, publishing, distributing, and circulating issues of the *Galilean* magazine, dated in the period December 22, 1941, to March 2, 1942, and the pamphlet "We Fight for This Republic Only!", containing articles and statements set forth in count 10.

The statements and articles alleged and set forth in count 10, embraced a variety of topics: Responsibility for the war was placed on the United States and its officials (e. g., R. 13–14, 15, 16, 17, 18, 21, 22, 23, 49, 50); the purposes of the Government in the war (e. g., R. 14, 27) and

[4] The statements and articles were alleged to have appeared in the pamphlet, and in *Galilean* magazine issues dated December 22, 1941, December 29, 1941, January 5, 1942, January 12, 1942, January 19, 1942, January 26, 1942, February 2, 1942, February 9, 1942, February 16, 1942, February 23, 1942, and March 2, 1942 (R. 13–58).

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the motives of the nation's wartime leaders (e. g., R. 15, 18, 39) were branded as base; difficulties inherent in prosecuting and financing the war effort were stressed (e. g., R. 27, 28, 29, 30, 31); it was asserted that the raising of a large army would have deleterious effects (e. g., R. 15, 18, 19, 26, 29), and claimed that the people of the nation were lacking in spirit and were not united (e. g., R. 21, 22, 25, 27, 28, 29, 39, 49, 53, 54, 55); our allies were said to be pursuing questionable activities and to have unworthy designs (e. g., R. 24); the conduct of our army leaders in directing the armed forces was castigated (e. g., R. 44, 55); our enemies were praised and said to occupy a highly ethical position in the conflict (e. g., R. 17, 22, 23, 27); and it was emphasized that our defeat was probable (e. g., R. 18, 23, 24, 25–26, 39, 45–46, 55, 56).

ARGUMENT

I

1. Petitioners contend (Pet. 5–8, 22–29) that the trial court erred in overruling their plea [5] in abatement because women were improperly excluded from the grand jury that returned the indictment (R. 67, 72, 73, 265, 286). A brief recital of the facts in this regard will disclose the lack of foundation for this contention. It had been the prac-

[5] The plea was filed by petitioners Pelley and Brown only, and not on behalf of petitioner Fellowship Press, Inc. (R. 69; but see R. 65).

tice of the jury commissioner and the clerk of the District Court to write to the judge of each circuit court in each county within the district asking for a list of names of persons qualified for jury service. This practice evidently was thought to afford a convenient method of assuring compliance with Section 275 of the Judicial Code (28 U. S. C. 411) which required that jurors should have the same qualifications as jurors in the highest court of the state. At one time, the form letter which was thus sent to the state judges requested a list of "good and capable men"; but after the absence of women jurors had been challenged in certain cases, the form letter was changed more than two years ago so as to request a list of "persons" who would be qualified for jury service [6] (R. 266, 272–273).

Although it is true that there were no women on the grand jury which returned the indictment in this case, there is no proof that the names furnished under the new practice did not include names of women, or that such names were excluded from the jury box from which the grand jury was drawn.[7]

[6] The record is not clear as to whether any of the 1,400 names put in the jury box prior to the change in practice were still there at the time of insertion of the names obtained by the later practice (R. 265, 266, 273). This ambiguity should be resolved in favor of the Government. See *Glasser* v. *United States*, 315 U. S. 60, 80, 87.

[7] It was stipulated that the names of the jurors were placed in and withdrawn from the jury box in accordance

Contrary to petitioners' contention (Pet. 23–24), the action of the clerk and jury commissioner in obtaining from County Judges the names of persons qualified as jurors, did not constitute a delegation of their duties, or a discriminatory selection by any special group or any interested person. Cf. *Hill* v. *Texas,* 316 U. S. 400; *Glasser* v. *United States,* 315 U. S. 60, 83–87. Though the clerk and jury commissioner did not "go into" the qualifications of the persons whose names they obtained (R. 266) and made no examination or special effort to ascertain whether names of women were included (R. 266, 271, 272), the evidence requires the conclusion that they personally prepared the list, since they knew the names obtained from each county before placing them in the box (R. 266), and they excluded the name of any person who had served during a given period (R. 272). Cf. *Glasser* v. *United States, supra,* at 85; *In re Petition for Special Grand Jury,* 50 F. (2d) 973 (M. D. Pa.); *United States* v. *Murphy,* 224 Fed. 554 (N. D. N. Y.).[8]

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with law, and that there were more than 300 names in the box at the time the grand jury was drawn (R. 272).

[8] Even assuming a technical irregularity because of the omission of women, the court below properly held there would not have been error because no prejudice to petitioners' case was shown (R. 661), nor was any inferable, since neither of them are of the sex alleged to have been excluded. *Wuichet* v. *United States,* 8 F. (2d) 561, 563 (C. C. A. 6); *United States* v. *Ballard,* 35 F. Supp. 105, 107 (S. D. Cal.) An indictment cannot be quashed nor a plea in abatement thereto sustained, merely because of an

2. Petitioners also challenge the indictment because the grand jury was assisted by two special assistants to the Attorney General (R. 267–271, 283–286); they apparently contend (Pet. 30–31) that the United States Attorney has the exclusive authority to present a case to the grand jury. In support of their position, petitioners, for the

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irregularity in the drawing of a grand jury, where no prejudice to the accused is shown. *Hyde* v. *United States*, 225 U. S. 347, 374; *Agnew* v. *United States*, 165 U. S. 36, 44; *United States* v. *Parker*, 103 F. (2d) 857, 859 (C. C. A. 3), certiorari denied, 307 U. S. 642; *Walker* v. *United States*, 93 F. (2d) 383, 391 (C. C. A. 8), certiorari denied, 303 U. S. 644; *Morrison* v. *United States*, 71 F. (2d) 358, 359 (C. C. A. 5), certiorari denied, 293 U. S. 589; *Moffatt* v. *United States*, 232 Fed. 522, 528 (C. C. A. 8); *Stockslager* v. *United States*, 116 Fed. 590, 596 (C. C. A. 9); *Brookman* v. *United States*, 8 F. (2d) 803, 806 (C. C. A. 8). Thus, had the defendant in *Hill* v. *Texas*, 316 U. S. 400, been a white person, it would seem abundantly clear that he could not complain about the exclusion of negroes where no prejudice is otherwise shown.

Moreover, there is serious doubt whether the ruling of the District Court on the plea in abatement was reviewable at all upon appeal. Section 879, Title 28, U. S. C. (Section 1011, Revised Statutes) unambiguously provides:

> There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ or error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact.

And these provisions have been relied upon in at least three cases as a bar to appellate review of the trial court's rulings on pleas in abatement in criminal cases. *Mounday* v. *United States*, 225 Fed. 965 (C. C. A. 8), certiorari denied, 239 U. S. 645; *Biemer* v. *United States*, 54 F. (2d) 1045 (C. C. A. 7), certiorari denied, 286 U. S. 566; *Luxenberg* v. *United States*, 45 F. (2d) 497 (C. C. A. 4), certiorari denied, 283 U. S. 820.

first time, make the extraordinary argument (Pet. 8–10, 29–33) that the Act of June 30, 1906, 34 Stat. 816, authorizing the Attorney General and his assistants to conduct grand jury proceedings is unconstitutional in that it permits "an invasion of the Judiciary by the Executive Department of the Government" (Pet. 33). The contention is frivolous. Since 1789 the Attorney General has been vested with plenary power over the legal affairs of the United States to the full extent that it falls within the executive branch of the Government (5 U. S. C. 291). *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 280. Included is supervisory and directory power over United States Attorneys (5 U. S. C. 317); he may employ other attorneys to assist district attorneys and has power to supervise their conduct and proceedings (5 U. S. C. 312). Cf. *United States* v. *Virginia-Carolina Chemical Co.*, 163 Fed. 66 (C. C. M. D. Tenn.). Furthermore, the presentation of evidence to a grand jury is not a judicial function. Cf. *State* v. *Price*, 101 Ohio St. 50, 58–59, 60–61 (1920); *Walsh* v. *Railroad Commission*, 16 Cal. (2d) 691, 694 (1940); *People* v. *Bird*, 212 Cal. 632, 640–643 (1931).

II

Petitioners' contentions that the several counts of the indictment were insufficient and that their demurrers should have been sustained (Pet. 10–12, 33–43), together with their related contention based upon their motions for a bill of particulars

(Pet. 12, 43–45), are without merit. The court below correctly indicated (R. 648) that since the sentences imposed did not exceed that which lawfully might have been imposed under any one of the several counts, insufficiency of all counts is required to warrant reversal. *Pierce* v. *United States,* 252 U. S. 239, 252–253; *Doe* v. *United States* 253 Fed. 903, 904 (C. C. A. 8); cf. *Brooks* v. *United States,* 267 U. S. 432, 441; *Abrams* v. *United States,* 250 U. S. 616, 619; *Evans* v. *United States,* 153 U. S. 608, 609; *Claassen* v. *United States,* 142 U. S. 140, 146.[9]

Petitioners challenge particularly count 10, which the circuit court of appeals considered at length (R. 648–651), on the ground that it failed to allege "how and by what means" petitioners caused and attempted to cause insubordination in the armed forces (Pet. 39). But this count charges that for those purposes petitioners printed and distributed statements and articles which occupy 45 printed pages in the record (R. 13–58), fully satisfying all requirements of specificity. *Debs* v. *United States,* 249 U. S. 211, 212, 215; *Stokes* v. *United States,* 264 Fed. 18, 21 (C. C. A. 8); *Doe* v. *United States,* 253 Fed. 903, 904–905 (C. C. A. 8); *United States* v. *Prieth,* 251 Fed. 946, 955 (D. N. J.). It was not necessary to allege that the statements were made under circum-

[9] Petitioners Pelley and Brown did not demur to or otherwise challenge the sufficiency of count 12 (see R. 164, 169–239, 239–242, 251), and are not in position to urge reversal by reason of insufficiency of the indictment.

stances showing a clear and present danger of bringing about the evils that Congress sought to prevent. *Pierce* v. *United States, supra,* at 243, 244.[10]

The sufficiency of the remaining counts is equally clear.[11] Contrary to petitioners' argument (Pet. 37) it was not required to allege in counts 1 to 5 and 7 to 9 "the truth in contrast to the statements alleged to have been false", since the indictment is sufficiently specific under the statute when it alleges the untruth of petitioners' statements. The alleged false statements were "statements" in the statutory sense as distinguished from "opinions". *Pierce* v. *United States, supra,* at 251, 252, cf. dissenting opinion, pp. 255–256, 264, 266–267. Count 11 plainly alleged that petitioners obstructed the recruiting services (R. 58–59), and whether the actions alleged tended to

[10] Petitioners inferentially suggest that count 10 may be defective for charging that they attempted to cause and also caused insubordination (Pet. 38), but it is clear that the count is not duplicitous. *Balbas* v. *United States*, 257 Fed. 17, 22 (C. C. A. 1). See *Debs* v. *United States, supra; Crain* v. *United States*, 162 U. S. 625, 634–636; *Connors* v. *United States*, 158 U. S. 408, 410–411; *Ackley* v. *United States*, 200 Fed. 217, 221 (C. C. A. 8). Cf. *United States* v. *Dembowski*, 252 Fed. 894 (E. D. Mich.).

[11] Indictments substantially in the same form have been consistently upheld. See *Pierce* v. *United States, supra;* affirming 245 Fed. 878; *Schaefer* v. *United States*, 251 U. S. 466, affirming 254 Fed. 135; *Debs* v. *United States, supra, Kirchner* v. *United States*, 255 Fed. 301, 303–304 (C. C. A. 4), certiorari dismissed, 250 U. S. 678; *Hickson* v. *United States*, 258 Fed. 867, 868–869 (C. C. A. 4).

have that effect was for the jury. *Pierce* v. *United States, supra,* at 244. It was not necessary to allege where the obstruction "took place and of what it consisted" (Pet. 39). *Stokes* v. *United States, supra; Debs* v. *United States, supra.* Contrary to petitioners' contention (Pet. 42, 43), it was not necessary that count 12 allege the names of the agents whose acts implicated petitioner Fellowship Press, Inc. Cf. *Zito* v. *United States,* 64 F. (2d) 772, 773 (C. C. A. 7). The conspiracy, which is the gist of the offense (*Frohwerk* v. *United States,* 249 U. S. 204, 210), was clearly alleged.

III

1. Petitioners contend it was error to admit in evidence certain of Pelley's pre-war writings and publications (Pet. 12–13, 45–51). They argue these exhibits [12] were not relevant to any issue in-

[12] (1) "The Door to Revelation. An autobiography by William Dudley Pelley" (1939) (Gov. Ex. 13, R. 305–315); (2) Pelley's Weekly, issue of March 4, 1936, with article entitled, "German Americans Should Support the Commonwealth" (Gov. Ex. 15, R. 499–505; identical except for variation in title with Gov. Ex. 20, R. 513) and, the issue of April 22, 1936, with article entitled "Pelley Addresses Germans on National Relationships" (Gov. Ex. 16, R. 505–506); (3) A handbook on the Silver Shirts Legion (R. 305) entitled "One Million Silvershirts by 1939" (1938) (Gov. Ex. 17A, R. 333, 512–513); (4) an article from the Liberation Magazine, issue of July 28, 1938, entitled, "What All Non-Nazis Should Know About the Swastika and Its Hidden Meaning" (Gov. Ex. 18, R. 507–508); (5) a leaflet or pamphlet entitled, "The Scourge of Cords"